

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELANO PETTWAY,

Defendant-Appellant.

UNPUBLISHED
February 21, 2003

No. 234895
Wayne Circuit Court
LC No. 00-010017

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, two counts of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to concurrent sentences of life imprisonment for the first-degree premeditated murder conviction, eighteen to forty years' imprisonment for each of the assault with intent to commit murder convictions, and two to five years' imprisonment for the felon in possession of a firearm conviction, to run consecutively to the mandatory two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant contends that there was insufficient evidence presented at trial to convict him of first-degree premeditated murder. In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The following nonexclusive list of factors may be considered to establish premeditation and deliberation: "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted." *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991). The elements of premeditation

and deliberation may be inferred from the circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The circumstances surrounding the victim's death demonstrate premeditation and deliberation. Testimony from various witnesses established that defendant waited outside Barton's Store with a gun in his possession. When the victim, Antuan Ray, and two other men, Jerome Simmons and Myron Johnson, left the store, defendant approached them, and demanded Johnson's expensive sunglasses at gunpoint. When it became apparent that Johnson was not going to give him the glasses, defendant started shooting. After defendant shot Ray the first time, he could have fled the scene. Instead, he shot Ray two more times while Ray was helpless on the ground. Defendant then chased after and fired at Simmons and Johnson, striking Simmons in the chest with his gunfire. When Johnson returned fire, defendant fled, and ran to a waiting automobile, which accelerated rapidly away when defendant reached the passenger seat. This evidence, when viewed in the light most favorable to the prosecution, is sufficient for a reasonable trier of fact to find defendant guilty beyond a reasonable doubt of first-degree premeditated murder.

Defendant next contends that prosecutorial misconduct denied him his due process rights to a fair trial. A defendant's unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Schutte*, *supra* at 720.

Defendant claims the prosecutor denied him a fair trial by improperly referring to him as a liar, thus usurping the role of the jury to make credibility assessments. These references occurred during the prosecutor's closing and rebuttal arguments.

Prosecutors cannot make statements of fact unsupported by the evidence, but remain free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. A prosecutor's remarks cannot be viewed in isolation – the scope of appellate review must include the context in which the remarks were made. *Schutte*, *supra* at 721. In addition, a prosecutor may argue from the facts that a defendant is not believable. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Further, a prosecutor may argue from the facts that the defendant is not worthy of belief, even if the characterization is that defendant is a "liar." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor may likewise draw reasonable inferences from the evidence admitted at trial and argue that those inferences indicate a defendant's guilt. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Investigator Dale Collins, of the Detroit Police Department, read into evidence the statement defendant made to Collins while under arrest. In the statement, defendant admitted to having been at the scene of the shooting, but denied possessing or firing a gun at that time. Defendant also admitted that he had lied to Dearborn police about being carjacked and shot. Since defendant admitted lying to Dearborn police, the prosecutor's comments during closing and rebuttal arguments were supported by evidence admitted at trial and permissible inferences arising from the evidence. It was permissible for the prosecutor, based on that testimony, to argue that defendant was not honest with the police, and thus, was a liar whose denial of being

the shooter should not be believed. The prosecutor was merely summarizing the facts in evidence, as testified to by Collins and defendant's own statement, and encouraging the jury to draw reasonable inferences from those facts. Furthermore, the court told the jury during instructions that the attorney's statements are not evidence and that it was up to the jury to decide witness credibility. The jury is presumed to follow the instructions given to them by the court. *People v Graves*, 458 Mich 476, 581 NW2d 229 (1998). Therefore, defendant has not demonstrated any prosecutorial misconduct resulting in a plain error affecting his substantial rights.

Defendant next objects to the in-court identification of him by Simmons. Defendant claims that the identification should have been suppressed because the pretrial photographic lineup was unduly suggestive and the prosecution did not present an independent basis for the in-court identification. This Court reviews defendant's unpreserved issue for plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

Identification procedures that are unnecessarily suggestive and conducive to irreparable misidentification deny a defendant due process. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). In order to challenge an identification on the basis of lack of due process, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

Generally, a photographic lineup should not be used for identification "when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *Kurylczyk*, *supra* at 298 n 8; *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). A defendant is subject to legal compulsion to appear at a lineup when a warrant has been issued for his arrest. *People v Harrison*, 138 Mich App 74, 77; 359 NW2d 256 (1984).

In this case, defendant was not in custody when Simmons and Johnson were shown the photographic lineup. However, a defense attorney was present during the identification process. The attorney made no objection to the photographic lineup procedure. The photo array was prepared with six photographs that were similar to defendant in appearance relating to complexion, hair, and other characteristics. Simmons and Johnson were brought separately into the viewing area, and they each identified defendant immediately as the shooter. Simmons and Johnson did not have the opportunity to talk with each other between their respective identifications of defendant from the lineup. Simmons testified that a police officer told him that they were pretty sure they had the guy in the photo array. The officer in charge of the case testified that he did not tell Simmons and Johnson that they had to pick someone out of the lineup. In fact, he stated that he was surprised that they picked defendant out. He stated during cross-examination that he told Simmons and Johnson that the shooter might be in the photographic lineup.

The circumstances and procedure used during the photographic lineup were not impermissibly suggestive.¹ From the record, it appears that the photo array was fair, and

¹ In addition, defense counsel requested admission of the photo array.

Simmons and Johnson had no problem independently identifying defendant as the shooter. The comment the officer in charge made, i.e., that the shooter might be in the lineup, is not sufficiently coercive to make the lineup impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). Further, the fact that Simmons and Johnson collaborated on a sketch of the shooter before they identified defendant at the lineup does not change their positive identification of defendant from the photograph. In fact, defendant argues in his appellate brief that the sketch was a better representation of the shooter than his photograph. Defendant argues that the differences between the witnesses' description of his hair, beard, and teeth and his appearance at trial indicate the unreliability of Simmons' identification. "Any discrepancy between complainant's initial description and defendant's actual appearance is relevant to the weight of such evidence, not to its admissibility." *People v Davis*, 241 Mich App 697, 705; 617 NW2d 381 (2000). Therefore, defendant has failed to demonstrate a clear error affecting his substantial rights.

In his final issue, defendant claims that his trial counsel's failure to move for a hearing regarding the admissibility of the prosecution witnesses' improperly tainted pretrial identification and subsequent in-court identification is evidence that he was denied the effective assistance of counsel. This Court will not reverse a conviction based on ineffective assistance of counsel unless the defendant establishes that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

An independent basis for a witness' in-court identification is unnecessary where a defendant has not shown that the pretrial identifications were impermissibly suggestive. *McElhaney*, *supra* at 288. Since, as discussed, *supra*, the pre-trial photographic lineup was not unduly suggestive, defense counsel was not ineffective and did not deny defendant his due process rights by failing to object to the introduction of evidence about the lineup or the in-court identification. Counsel need not argue a meritless issue. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen Fort Hood